

E-Filed 6/8/2010

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

RONALD M. NAKAMOTO,
Plaintiff,
v.
LOCKHEED MARTIN CORPORATION,
Defendant.

Case Number C 09-05193 JF (HRL)

**ORDER¹ GRANTING MOTION FOR
SUMMARY ADJUDICATION AND
MOTION TO STRIKE**

[re: document no. 6]

I. BACKGROUND

A. Factual Background

1. Alleged Discrimination

The instant action arises out of an employment dispute between Plaintiff Ronald Nakamoto (“Plaintiff”) and Defendant Lockheed Martin Corporation (“Defendant”). Plaintiff was employed by Defendant from 1985 until his retirement in 2009. Complaint ¶ 12. “In 2006, the last evaluation Plaintiff received prior to his demotion indicated that his performance was ‘vastly superior’ to his peers.” *Id.* ¶ 15. In December 2006, Plaintiff was appointed as Chief

¹ This disposition is not designated for publication in the official reports.

1 Operating Officer (“COO”) of Savi Group and Vice President and General Manager of Global
 2 InTransit Visibility (“GITV”), a business unit within Savi Group. In April 2007, Plaintiff was
 3 appointed Chief Executive Officer of Savi Technologies. *Id.* ¶ 16.

4 In March 2007, Linda Gooden was promoted to Executive Vice President of Lockheed
 5 Martin Integrated Systems and Solutions and became Plaintiff’s supervisor. *Id.* ¶ 18. During a
 6 meeting of several Lockheed officials on October 26, 2007 Gooden made the following allegedly
 7 false statements about Plaintiff: “(i) ‘he is an introvert;’ (ii) ‘he is not a good business leader;’
 8 (iii) assigning him to be the VP of Engineering for Savi Technology ‘should be good for him
 9 since he would only have to deal with inside matters;’ (iv) ‘since Ron is an introvert, he should
 10 be happy with this position,’ and (v) ‘despite these leadership shortcomings, ‘he is good
 11 technically.’” *Id.* ¶ 19. On that same day, Defendant replaced Plaintiff with Robert Kramer as
 12 COO of Savi Group and offered Plaintiff a “newly created position of Vice President
 13 Engineering for Savi Group.” Complaint ¶¶ 21, 23. Plaintiff alleges that the offered position
 14 constituted a demotion “since the position would report to the COO (Kramer), did not involve
 15 leading a business unit and was a plain diminution in material responsibility and authority from
 16 his previous positions. This position would result in previous direct report employees assuming
 17 peer and supervisory status over Nakamoto.” *Id.* ¶ 23.

18 Plaintiff, who is Asian-American, alleges that he was demoted because of his race and
 19 replaced with a Caucasian executive who was less qualified for the position. *Id.* ¶¶ 21-22
 20 (alleging the following comparative facts: (1) at the time of his demotion Plaintiff “had served at
 21 the rank of business unit leader with the title ‘Vice President and General Manager,’” while the
 22 “highest rank Kramer had obtained was ‘Vice President’”; (2) Plaintiff “had 33 years of
 23 experience in the business, Kramer had 20 years of experience;” (3) Plaintiff “had led a \$1.5
 24 billion dollar business with 3,300 employees. Kramer had led a \$140 million dollar business
 25 with 450 employees”; (4) Plaintiff “had led six businesses; Kramer had led one”; (5) Plaintiff
 26 “had won \$3.2 billion dollars in orders, achieved a 99% ‘win rate,’ received a performance
 27 evaluation of ‘vastly superior’ to his peers and had been named Asian-American Engineer of the
 28 year by the Chinese Institute of Engineers-USA” while “Kramer had managed a single program

1 with no wins"; (6) Plaintiff served as program manager on thirteen programs and rated as one of
 2 two master program managers within the company compared to Kramer who had been program
 3 manager for only one program and was not rated within the company; and (7) Plaintiff developed
 4 two technology start-up companies and Kramer had no similar experience).

5 After assuming his new position, Plaintiff complained of discrimination to his superiors.
 6 Plaintiff alleges that Defendant then retaliated by removing him from all positions within
 7 Lockheed as of November 9, 2007. *Id.* ¶¶ 24, 26.

8 **2. Release Agreement**

9 In the spring and early fall of 2008, the parties engaged in negotiations regarding the
 10 employment dispute presently before the Court. Declaration of Ronald Nakamoto ("Nakamoto
 11 Decl.") ¶ 8. On September 16, 2008, Kimberly Adams, Defendant's Vice President of Human
 12 Resources, Enterprise Operations, sent Plaintiff a Draft Confidential Agreement and Release
 13 ("Draft Release Agreement").² The Draft Release Agreement expressly provided that Plaintiff
 14 would have a twenty-one day period within which to consider signing the release and seven days

15
 16 ² Paragraph five of the executed Agreement identified the "Claims Released," including
 in pertinent part:

17 In consideration of the Benefits provided to you under this Agreement...you...
 18 hereby agree to waive and irrevocably and unconditionally fully release, acquit
 19 and forever discharge from liability any of the Released Parties listed below for
 20 any and all claims, demands, losses, liabilities, promises, and causes of action or
 21 similar rights of any nature or type whatsoever (known and unknown) that you
 22 may now have or have had with respect to any of the Released Parties arising on
 23 or before the date this Agreement is signed, as a result of or because of any act,
 24 omission, or failure to act by the Released Parties, including but without
 limitation those arising out of or relating in any way to your employment by,
 association with Corporation (hereinafter collectively referred to as "Claims").
 THIS IS A GENERAL RELEASE, subject only to the specific exceptions set
 forth in paragraphs 5(b) and 5(c).

25 (a) Claims released include, but are not limited to, any claims...under Title VII of
 26 the Civil Rights Act of 1964, Executive Order 11246, the Civil Rights Act of
 27 1991, Section 1981...or any other local, city, county, state or federal statutes, laws,
 regulations or ordinances prohibiting harassment, discrimination or retaliation on
 these or any other grounds or otherwise governing the employment relationship.

28 Nakamoto Decl. Ex. A, ¶ 5(a).

1 to revoke the agreement after signing. Declaration of Kimberly Adams (“Adams Decl.”) ¶ 2.
 2 Negotiations continued and Defendant “agreed to extend the consideration period of the Draft
 3 Release Agreement first to October 17, 2008, and later to October 27, 2008.” *Id.* ¶ 3.

4 On October 23, 2008, Adams sent Plaintiff a revised version of the Confidential
 5 Agreement and Release (Agreement). *Id.* ¶ 4. On October 27, 2008, Plaintiff signed the
 6 Agreement after making two changes. *Id.*, Ex. A; *see also* Nakamoto Decl. ¶ 8, Ex. A
 7 (Agreement). Plaintiff’s changes related to the role of executive discretion in his “transitional
 8 employment” and eliminated the underlined and bolded language in the passage quoted below:

9 (b) Transitional Employment. In the role of Vice President and Managing
 10 Director for Technology Transition, Corporate Engineering and Technology,
 11 which is a rotational assignment that you will assume effective immediately, you
 12 will receive an annual salary of \$REDACTED retroactive from the effective date
 13 of this Agreement to February 1, 2008. You are eligible to remain in this
 14 rotational position for up to 3 years, ending September 1, 2001, with senior
 15 executive approval **and** based on your satisfactory performance against
 16 established objectives. At the end of the rotational assignment, **or prior to that**
time in the absence of senior executive approval and satisfactory
performance, you acknowledge and agree that you will: i) transition to another
 17 position within the Corporation, which you will be responsible for identifying and
 18 obtaining an offer; ii) accept reassignment to an equivalent position that may be
 19 offered by the Corporation; or iii) retire from the Corporation.

20 Adams Decl., Ex. A ¶ 3(b); Nakamoto Decl., Ex. A ¶ 3(b).

21 On October 30, 2008, Adams informed Plaintiff in writing that Defendant had accepted
 22 Plaintiff’s interlineations and confirmed that the seven-day revocation period identified in the
 23 Agreement had commenced. Adams Decl. ¶ 5; Nakamoto Decl. Ex. C (email exchange between
 24 Adams and Plaintiff in which Plaintiff stated on October 28 that, “I would like to verify that the 7
 25 day wait period is now in effect...” and Adams replied on October 30 that “the revocation period
 26 has started.”). On November 4, 2008, Plaintiff attempted to revoke the Agreement. Adams Decl.
 27 ¶ 6; Nakamoto Decl., Ex. D. Adams informed Plaintiff that “his revocation was untimely
 28 because it occurred eight days after Nakamoto signed the Release Agreement, rather than the
 seven days provided for in the Release Agreement.” Adams Decl. ¶ 6.

29 Following their execution of the Agreement, the parties took the following steps in
 30 compliance with its terms: (1) “Nakamoto accepted a position as Vice President and Managing
 31 Director for Technology Transition in the Corporate Engineering and Technology organization.

1 His annual salary increased to the agreed upon amount in the Release Agreement, retroactive to
 2 February 1, 2008, and he was eligible to participate in the same benefits for which he was
 3 eligible prior to accepting this position”; (2) Defendant paid Plaintiff “a lump sum payment equal
 4 to the agreed upon amount in the Release Agreement”; (3) “the Board of Directors ratified and
 5 approved Nakamoto’s stock options and [restricted stock units] RSUs with an aggregate
 6 economic value equal to the agreed upon amount in the Release Agreement”; (4) Defendant
 7 provided Plaintiff with a Management Incentive Compensation Plan (“MICP”) payment equal to
 8 the amount agreed upon in the Agreement; and (5) Plaintiff’s “eligibility to participate in
 9 Lockheed’s employee benefit plans continued until his eligibility terminated when he retired
 10 from Lockheed on June 30, 2009.” *Id.* ¶ 7.

11 Plaintiff has not “returned the salary, salary increase, lump sum payment, or MICP
 12 payment that he received under the terms of the Release Agreement.” *Id.* ¶ 8. Plaintiff alleges
 13 that while he is “still in possession of proceeds presented to [him] by Lockheed as part of the
 14 revoked Release Agreement, less federal and state withholdings,” he “attempted to reach
 15 agreement with Lockheed about a tender back of all sums with accommodations for taxes and
 16 other sums withheld as it was [his] belief that Lockheed would have methods for obtaining
 17 refunds of those sums”, but that “Lockheed never responded to [his] inquiries on this subject.”
 18 Nakamoto Decl. ¶ 14. Plaintiff also asserts that he remains “ready, willing and able to tender
 19 back net proceeds paid to [him] by Lockheed with adjustments, as applicable, for taxes and other
 20 sums withheld.” *Id.* Finally, Plaintiff alleges that the attorney’s fees he received as part of the
 21 consideration of the Agreement were returned to Defendant by his counsel “shortly after receipt.”
 22 *Id.*

23 **B. Procedural History**

24 Plaintiff filed the instant action on November 3, 2009, alleging the following claims for
 25 relief: (1) wrongful demotion in violation of 42 U.S.C. § 1981; (2) constructive discharge in
 26 violation of 42 U.S.C. § 1981; (3) retaliation in violation of 42 U.S.C. § 1981; (4) breach of
 27 employment contract; and (5) breach of covenant of good faith and fair dealing. On February 12,
 28 2010, Defendant moved to dismiss Plaintiff’s claims for relief based on events that occurred

1 prior to the date upon which Plaintiff signed the Agreement. Defendant also moved in the
 2 alternative for summary adjudication with respect to the same claims. Finally, Defendant moved
 3 to strike any references to the subject events from the complaint. Plaintiff opposes the motions.
 4 For the reasons discussed below, the motion for summary adjudication and motion to strike will
 5 be granted.

6 **II. LEGAL STANDARDS**

7 **A. Rule 12(b)(6) Motion to Dismiss**

8 “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a
 9 cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v.*
 10 *Centinela Hosp. Medical Center*, 521 F.3d 1097, 1104 (9th Cir.2008). For purposes of a motion
 11 to dismiss, “all allegations of material fact are taken as true and construed in the light most
 12 favorable to the nonmoving party.” *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-338 (9th
 13 Cir. 1996). However, “[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does
 14 not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle
 15 [ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the
 16 elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555,
 17 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal citations omitted). Leave to amend must be
 18 granted unless it is clear that the complaint’s deficiencies cannot be cured by amendment. *Lucas*
 19 *v. Department of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995).

20 **B. Rule 56 Motion for Summary Adjudication**

21 Summary judgment or adjudication is appropriate when there are no genuine and disputed
 22 issues of material fact and the moving party is entitled to prevail as a matter of law. Fed. R. Civ.
 23 P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). “The evidence must be viewed in
 24 the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in
 25 favor of that party.” *LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000). “If
 26 conflicting inferences may be drawn from the facts, the case must go to the jury.” *Id.* The
 27 moving party bears the burden of showing that there is no material factual dispute. Therefore,
 28 the court must regard as true the opposing party’s evidence, if supported by affidavits or other

1 evidentiary material. *Celotex*, 477 U.S. at 324.

2 **C. Motion to Strike Portions of Complaint**

3 Pursuant to Federal Rule of Civil Procedure 12(f), the court may "strike from a pleading
 4 an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Where
 5 the damages sought in a prayer for relief are not recoverable as a matter of law, a motion to
 6 strike maybe used to strike the prayer for such damages. *Bureerong v. Uvamas*, 922 F. Supp.
 7 1450, 1479, n.34 (C.D. Cal. 1996), citing *Tapley v. Lockwood Green Engineers, Inc.*, 502 F.2d.
 8 559, 560 (8th Cir. 1974); *Wilkerson v. Butler*, 229 F.R.D. 166, 172 (E.D. Cal. 2005).

9 The grounds for a motion to strike must appear on the face of the complaint or from
 10 matter which the court may judicially notice and the court must view the pleading in the light
 11 most favorable to the pleader. *SEC v. Sands*, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995); *Lazar v.*
 12 *Trans Union LLC*, 195 F.R.D. 665, 669 (C.D. Cal. 2000), citing *California v. United States*, 512
 13 F.Supp. 36, 39 (N.D. Cal. 1981). The central function of a Rule 12(f) motion is "to avoid the
 14 expenditure of time and money that must arise from litigating spurious issues by dispensing with
 15 those issues prior to trial." *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir.
 16 1983).

17 **III. DISCUSSION**

18 **A. Documents Considered**

19 "[A]lthough a court generally may not consider matters beyond the pleadings on a Rule
 20 12(b)(6) motion, 'when [the] plaintiff fails to introduce a pertinent document as part of his
 21 pleading, [the] defendant may introduce the exhibit as part of his motion attacking the
 22 pleadings.'" *S.M. v. W. Contrac Costa Cty. Unified Sch. Dist. Fin. Corp.*, No. 07-5829 CW,
 23 2009 WL 1033826, at *3 (N.D. Cal. Apr. 16, 2009), quoting *Branch v. Tunnell*, 14 F.3d 449,
 24 453-54 (9th Cir. 1994), *overruled on other grounds*, *Galbraith v. County of Santa Clara*, 307
 25 F.3d 1119 (9th Cir. 2002) (citation omitted). This rule "[p]revent[s] plaintiffs from surviving a
 26 Rule 12(b)(6) motion by deliberately omitting references to documents upon which their claims
 27 are based." *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998), *abrogated on other*
 28 *grounds by Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006). The Agreement was

1 neither referred to in Plaintiff's complaint nor attached to his pleading. However, the document
 2 is pertinent to the pleading in that it may, depending on its legal effect, bar Plaintiff's claims for
 3 relief based on events that preceded its execution. Plaintiff does not object to the Court's
 4 consideration of the Agreement on the instant motion to dismiss and in fact attaches the
 5 Agreement as an exhibit to his own declaration. Nakamoto Decl., Ex. A. Accordingly, the Court
 6 could consider the Agreement within an analysis of the motion to dismiss.

7 However, Plaintiff also presents additional evidence in support of his opposition that is
 8 relevant and necessary with respect to the proper construction of the Agreement. Because it must
 9 rely upon evidence extrinsic to Plaintiff's pleading and the Agreement itself to resolve the
 10 question of whether Plaintiff may continue to assert the concerned claims for relief, the Court
 11 will address Defendant's alternative motion pursuant to Fed. R. Civ. P. 56.

12 **B. Motion for Summary Adjudication³**

13 "According to the California Supreme Court, a release is the 'abandonment,
 14 relinquishment or giving up of a right or claim to the person against whom it might have been
 15 demanded or enforced ... and its effect is to extinguish the cause of action.'" *Marder v. Lopez*,
 16 450 F.3d 445, 449 (9th Cir. 2006), quoting *Pellett v. Sonotone Corp.*, 26 Cal.2d 705, 160 P.2d
 17 783, 787 (1945); *see also* Cal. Civ. Code § 1541. "In general, a written release extinguishes any
 18 obligation covered by the release's terms, provided it has not been obtained by fraud, deception,
 19 misrepresentation, duress, or undue influence." *Id.*, quoting *Skrbina v. Fleming Cos.*, 45
 20 Cal.App.4th 1353, 53 Cal.Rptr.2d 481, 489 (1996).

21 The Agreement signed by Plaintiff on October 27, 2008, expressly releases Defendant
 22 from claims arising under 42 U.S.C. § 1981 arising from events that occurred prior to the
 23 execution of the Agreement, including Plaintiff's alleged demotion. The Agreement states:

24 Claims released include, but are not limited to, any claims. . .by you or by a
 25 person claiming to act on your behalf or in your interest under. . .the Civil Rights
 26 Act of 1991, Section 1981. . .or any other local, city, county, state or federal

27 ³ The facts as they relate to the enforceability of the Agreement are undisputed.
 28 Accordingly, there are no genuine issues of material fact, and the Court may adjudicate the
 29 enforceability of the Agreement on Plaintiff's claims arising prior to October 27, 2008 as a
 30 matter of law.

statutes, laws, regulations or ordinances prohibiting harassment, discrimination or retaliation on these or any other grounds or otherwise governing the employment relationship.

Adams Decl., Ex. A, ¶5(a). Plaintiff does not contest that his claims arising from events prior to October 27, 2008 would be barred by the Agreement if it were valid, but he contends that the Agreement is unenforceable because: (1) he timely revoked the Agreement, or in the alternative the Agreement was never formed; and (2) the Agreement violates the Older Workers Benefit Protection Act (“OWBPA”), 29 U.S.C. § 626(f).

1. Whether revocation was timely or the agreement was never formed

The Agreement clearly and conspicuously states that Plaintiff “may revoke this Agreement within **seven (7) calendar days** from the date of signing, in which case this Agreement shall be null and void and of no force and effect on the Released Parties or you and **that this Agreement shall not become effective or enforceable until the revocation period has expired.**” Nakamoto Decl., Ex. A ¶ 15(c) (emphasis in original). This language is consistent with the requirement of the OWBPA that an agreement releasing claims under the Age Discrimination in Employment Act (“ADEA”) “provide[] that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.” 29 U.S.C. § 626(f)(1)(G).

It is undisputed that Plaintiff signed the Agreement on October 27, 2008 and that he did not attempt to revoke the Agreement until November 4, eight calendar days later. However, Plaintiff points out that when he signed the Agreement on October 27, he also made two material changes to it.⁴ Plaintiff argues that the changes constituted a counter-offer as to which Defendant's acceptance was necessary before a contract could be formed. *See Roth v. Malson*, 67 Cal.App.4th 552, 557 (1998), quoting Cal. Civ. Code § 1585 ("An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. A qualified

⁴ Defendant does not dispute Plaintiff's characterization of the changes as material.

1 acceptance is a new proposal); *see also . Landberg v. Landberg*, 24 Cal.App.3d 742, 750 (1972)
 2 (internal citations omitted) (holding that “basic principles of the law of contract” include: “(1) a
 3 valid acceptance must be absolute and unqualified, and (2) qualified acceptance constitutes a
 4 rejection terminating the offer; it is a new proposal or counteroffer which must be accepted by
 5 the former offeror now turned offeree before a binding contract results.”). It is undisputed that
 6 Defendant’s first indication of assent to Plaintiff’s changes to the Agreement was communicated
 7 on October 30, 2008. Adams Decl. ¶ 5 (stating that Adams “notified Nakamoto in writing that
 8 Lockheed had accepted the interlineation Nakamoto had made...”); Nakamoto Decl., Ex. C
 9 (email from Adams to Plaintiff stating “I will initial the changes on Monday when I return to the
 10 office from travel. Please note the revocation period has started). Plaintiff contends that his
 11 revocation on November 4 thus was timely because it occurred within seven days of Defendant’s
 12 earliest expression of assent.

13 However, the plain language of the Agreement, as well as regulatory interpretation of the
 14 OWBPA, indicates that the seven-day revocation period commences upon the *employee’s*
 15 execution or signature, not the employer’s communication of assent. The Agreement states, “you
 16 may revoke this Agreement within seven (7) calendar days from the *date of signing*.” Nakamoto
 17 Decl., Ex. A ¶ 15(a) (emphasis added). The regulations of the Equal Employment Opportunity
 18 Commission (“EEOC”) interpreting the seven-day requirement provide that “an employee may
 19 *sign* a release prior to the end of the 21 or 45 day time period, thereby *commencing the*
 20 *mandatory 7 day revocation period.*” 29 C.F.R. § 1625.22(e)(6) (emphasis added).

21 Defendant’s assertion that the seven-day revocation period commenced at the time
 22 Plaintiff signed the Agreement also is supported by case law. *Armstrong v. Capstone*, No.
 23 C05-1433P, 2006 WL 1875592, at *2 (W.D. Wash. July 5, 2006) (holding that “the failure of any
 24 representative of Defendant to sign the waiver” is not fatal because “the statute only requires that
 25 the agreement be in writing, not that it be signed by an agent of the employer.”); *Bilton v.*
 26 *Monsanto Co.*, 947 F.Supp. 1344, 1349 (E.D. Mo. 1996) (concluding that because plaintiff
 27 signed the release on December 13, 1993, the Court concluded that the plaintiff “had until
 28 December 20, 1993 to revoke his acceptance”). However, neither *Armstrong* nor *Bilton*

1 considered the factual circumstances present here, in which the employee makes material
 2 changes to an agreement contemporaneously with his signature. In fact, in *Armstrong*, the court
 3 reasoned that “[t]he waiver constituted a written offer to Plaintiff, and the Defendant was bound
 4 to honor it upon Plaintiff’s acceptance (signing) of the agreement.” *Armstrong*, 2006 WL
 5 1875592, at *2, citing Restatement (Second) of Contracts § 50 (1981) (where offeree accepts
 6 offer in manner invited or required by offeror, offeree has completed manifestation of mutual
 7 assent and intent to be bound).

8 Plaintiff contends that the seven-day revocation period logically could not have begun
 9 prior to Defendant’s assent and the formation of the contract itself. Opp. at 7 (contending that
 10 “[t]he seven day revocation period cannot begin to run until there is an extant agreement to
 11 revoke. Otherwise the term ‘revoke’ is rendered nonsensical. There is simply nothing to revoke
 12 in the absence of a consummated agreement.”) However, while this argument might have some
 13 force as a matter of pure contract law, the Court is not persuaded by it in this specific context.
 14 First, even if no enforceable contract had been formed at the time of Plaintiff’s signature because
 15 of Plaintiff’s proposed changes, nothing about those changes prevented Plaintiff from revoking
 16 his assent to the terms of the Agreement as *Plaintiff* proposed to amend it. At the time he signed
 17 the Agreement, Plaintiff had full knowledge of its terms, including the changes he had made, as
 18 well as the explicit waiver provision that indicated that he “may revoke this Agreement within
 19 **seven (7) calendar days** from the date of *signing*.” Adams Decl., Ex. A ¶ 15(c) (bold in
 20 original, italics added).⁵

21 Second, the record reflects that Plaintiff himself believed that the seven-day revocation
 22 period began prior to Defendant’s assent. On October 28, 2008, the day after Plaintiff signed the
 23 Agreement and prior to Defendant’s assent to his changes, Plaintiff sent an email to Adams
 24 pointing out the changes that he had made to the Agreement and stating, “I would like to verify
 25

26 ⁵ Defendant contends that even if Plaintiff’s revocation of the Agreement was timely,
 27 Plaintiff’s failure to tender a return of the benefits he received established Plaintiff’s ratification
 28 of the terms of the contract. In light of the Court’s conclusion that the seven-day revocation
 period lapsed prior to Plaintiff’s attempted revocation, the Court need not determine the effect of
 Plaintiff’s failure to tender.

1 that the 7 day wait period is *now in effect* as I would like the org. announcement to get out.”
 2 Adams Decl., Ex. C (emphasis added). On October 30, 2008, Adams responded, “I will initial
 3 the changes on Monday when I return to the office from travel. Please note the revocation period
 4 has started.” *Id.* The only reasonable inference from Plaintiff’s request for verification is that
 5 Plaintiff believed that the revocation period had begun when he signed the Agreement. Adams’
 6 response on October 30, while admittedly not as clear as her declaration suggests, is not
 7 inconsistent with this belief. *Compare* Adams Decl. ¶ 5 (“On October 30, 2008, I notified
 8 Nakamoto in writing that Lockheed had accepted the interlineation Nakamoto had made and that
 9 the seven-day revocation period had begun on the day he signed the Release Agreement (October
 10 27, 2008)”) *with id.*, Ex. C (Email from Adams to Plaintiff on October 30, 2008) (replying to
 11 Plaintiff’s October 27 request for verification that the revocation period “is now in effect” by
 12 stating “I will initial the changes on Monday when I return to the office from travel. Please note
 13 the revocation period has started”, but not specifically indicating that the revocation period began
 14 on the day Plaintiff signed).⁶

15 **2. Whether the Agreement violates the OWBPA**

16 Plaintiff also contends that even if his attempt to revoke the Agreement occurred outside
 17 the seven-day period provided, the Agreement itself is unenforceable because it was not
 18 “knowing and voluntary” within the meaning of the OWBPA. 29 U.S.C. § 626(f). Among other
 19 mandates, the OWBPA provides that, “a waiver may not be considered knowing and voluntary
 20 unless at a minimum... (A) the waiver is part of an agreement between the individual and the
 21 employer...[and] (F)(i) the individual is given a period of at least 21 days within which to
 22 consider the agreement.” 29 U.S.C. § 626(f)(1).

23 Plaintiff argues that the Agreement could not be “knowing and voluntary” because he
 24

25 ⁶ Plaintiff also presents an alternative argument that no valid contract was ever formed
 26 because he revoked his assent prior to *Defendant* signing the Agreement. However, Plaintiff
 27 cites no case law or statutory authority in support of his contention that Defendant needed to sign
 28 the Agreement. The Court concludes that Defendant effectively assented to Plaintiff’s material
 changes in writing by email on October 30, several days prior to Plaintiff’s attempted revocation
 on November 4.

1 “extended a counter-offer and had no idea whether or not the offer would be accepted. As the
 2 facts transpired in this case, and if Lockheed’s argument is accepted, the company could have
 3 rescinded any of the terms contained in the Release Agreement well after Nakamoto actually
 4 signed it.” Opposition at 8. Plaintiff also argues that the Agreement violated the OWBPA
 5 because it did not comply with the statutory requirement that a twenty-one day consideration
 6 period be provided.⁷ However, even if the Court were to accept Plaintiff’s argument that the
 7 Agreement does not comply with the requirements established by the OWBPA, it remains
 8 enforceable as to all of Plaintiff’s non-ADEA claims for relief based on events occurring prior to
 9 the execution of the Agreement. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427-28,
 10 118 S.Ct. 838 (1998) (“Since Oubre’s release did not comply with the OWBPA’s stringent
 11 safeguards, it is unenforceable against her insofar as it purports to waive or release her ADEA
 12 claim. As a statutory matter, the release cannot bar her ADEA suit, irrespective of the validity of
 13 the contract as to *other claims*”) (emphasis added); *see also Kinghorn v. Citibank*, No. C
 14 97-3111 FMS, 1999 WL 30534, at *4 (N.D. Cal. Jan. 20, 1999), citing *Skrbina v. Fleming
 15 Companies*, 45 Cal.App.4th 1353, 1367-68 (1996) (“By its plain terms, 29 United States Code
 16 section 626(f)(1) applies only to rights or claims under the ADEA. It does not apply to a waiver
 17

18 ⁷ It is undisputed that the original draft of the Agreement provided Plaintiff a twenty-one
 19 day consideration period. It is also undisputed that Plaintiff only had four days to consider the
 20 revised version of the Agreement that he executed on October 27, 2008. It is this four day period
 21 that Plaintiff argues was insufficient under the OWBPA. However, as Defendant asserts, the
 22 regulations interpreting the OWBPA expressly provide that “parties may agree that changes [to a
 23 release agreement], whether material or immaterial, do not restart the running of the 21 or 45 day
 24 period.” 29 C.F.R. § 1625.22(e)(4) (stating in full, “[t]he 21 or 45 day period runs from the date
 25 of the employer’s final offer. Material changes to the final offer restart the running of the 21 or
 26 45 day period; changes made to the final offer that are not material do not restart the running of
 27 the 21 or 45 day period. The parties may agree that changes, whether material or immaterial, do
 28 not restart the running of the 21 or 45 day period.”)

25 The Agreement clearly states, “Acceptance of the terms of this Agreement must occur no
 26 later than October 27, 2008. *You agree that any modifications, material or otherwise, made to
 27 this Agreement do not restart or affect in any manner the original 21-day consideration period
 28 provided in the September 16, 2008 letter agreement.*” Adams Decl., Ex. A (executed
 29 Agreement). Accordingly, when Plaintiff signed the Agreement he agreed to its terms, including
 the fact that any modifications to the Agreement did not restart or affect the original twenty-one
 day consideration period.

1 of claims based on state law, which are the only claims at issue in the complaint upon which
2 summary judgment was granted...The trial court properly concluded the antiwaiver provisions of
3 the ADEA were inapplicable to plaintiff's release of his state law claims."). Plaintiff does not
4 allege any ADEA claims for relief. Accordingly, even if the Agreement did not comply with the
5 mandates of the OWBPA, it would be enforceable with respect to Plaintiff's claims for violations
6 of 42 U.S.C. § 1981, breach of contract, and breach of the covenant of good faith and fair
7 dealing.

8 **C. Motion to Strike**

9 Defendant also moves to strike portions of the complaint that relate to Plaintiff's claims
10 based on events occurring prior to the execution of the Agreement. Motion at 1-2 (listing the
11 allegations Defendant moves to strike). Because Defendant's motion for summary adjudication
12 as to such claims will be granted, its motion to strike also will be granted. Fed. R. Civ. P. 12(f)
13 (providing that the court may "strike from a pleading...redundant, immaterial, impertinent, or
14 scandalous matter.").

15 **IV. ORDER**

16 Good cause therefor appearing, Defendant's motion for summary adjudication and
17 motion to strike are GRANTED.

18 DATED: 6/8/2010

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21 JEREMY FOGEL
United States District Judge
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